FRONT Report LINE

June 2005 OFFICE OF MISSOURI ATTORNEY GENERAL Vol. 12, No. 1

Legislators OK fix for concealed-carry law

Senators gave final approval to legislation intended to fix a flaw in Missouri's concealed-carry law.

The Supreme Court last year upheld the legality of concealed guns but said the law's funding mechanism could impose an unconstitutional, unfunded mandate on local governments.

The Senate on May 3 passed House Bill 365, which seeks to correct the flaw. The House passed the same bill in March.

The bill would become law as soon as the governor signs it.

The bill now goes to the governor and would become law as soon as he signs it.

The current law allows sheriffs to use the fee only for equipment and training.

Because of that, the Supreme Court said, counties could be hit with new uncompensated costs.

The new legislation lets sheriffs use the money to cover all costs of the concealed-carry law, including background checks and the employment of additional staff.

If the $100 fee is not enough to cover the costs, then the legislation allows sheriffs to apply for reimbursement from the state Office of Administration.

Meth legislation awaits signing

LEGISLATIVE UPDATE

The General Assembly has passed legislation supported by the Attorney General requiring that certain cold medicines containing ephedrine or pseudoephedrine be sold by a licensed pharmacist or pharmacist technician.

House Bill 441 and Senate bills 10 and 27 place these new limitations on these drugs, which are regularly used to manufacture meth.

Oklahoma passed a similar measure in 2004 that has significantly reduced meth labs. In the past few months, Iowa, Kentucky, Tennessee and Arkansas have passed similar measures.

The legislation would:

- Make any compound containing a detectable quantity of pseudoephedrine a Schedule V substance.
- Require that the drugs be dispensed by a pharmacist or pharmacist technician.
- Require the buyer to provide photo identification and sign a log book.
- Limit the amount that may be dispensed to 9 grams within 30 days.

The legislation exempts these provisions for compounds in liquid or liquid-filled gel capsule form. It also exempts drugs filled by a prescription from the quantity limits.

The bill contains an emergency clause so that it will take effect upon the governor's signature.

Inventory searches limited: appeals court

State v. Louiso Ramires
No. 62863
Mo.App., W.D.
Dec. 21, 2004

In *State v. Ramires*, the Missouri Court of Appeals suppressed meth seized by police officers during an inventory search and clarified when containers may be searched pursuant to an inventory search.

Louiso Ramires' car was lawfully seized after an arrest for driving without a license and a weapon's violation.

Pursuant to a written policy of their agency, the arresting officers conducted an inventory search (after finding a handgun pursuant to a search incident to arrest).

SEE INVENTORY SEARCHES, Page 2

Supreme Court upholds convictions, says search is consensual

State v. Wayne Shoults Jr.
No. 84000
Mo. banc
Jan. 25, 2005

The Missouri Supreme Court affirmed Wayne Shoults Jr.'s conviction of the class C felony of possession of meth, in violation of Section 195.202, RSMo 2000, and the class D felony of possession of anhydrous ammonia in a non-approved container, in violation of Section 578.154, RSMo 2000.

The initial traffic stop was completed once the officer gave the warning and returned the driver's license to Shoults. More questioning following the conclusion of a stop is allowed if the encounter has become consensual. As long as the person is free to leave, the officer can talk to him and ask whether he has contraband on himself or in his car or home. Consent is freely and voluntarily given if, considering the totality of all circumstances, the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so.

In *State v. Wayne Shoults Jr.*, evidence supported a finding that Shoults' conversation with the officer after completion of the stop was consensual and that he freely and voluntarily consented to the auto search.

During questioning, the officer and Shoults were standing beside Shoults' vehicle, looking at the car. There was no "threatening presence."

Although two other officers came to the scene, they observed the two passengers, and only the original officer was talking to Shoults. She did not display her weapon or touch the driver. She testified she did not use coercive language or a stern tone of voice.

There was no evidence that consent was given under fraud or duress. The time from the stop to the request was about six minutes.

INVENTORY SEARCHES: CONTINUED FROM PAGE 1

The officers found a plastic bag containing another bag. The officers could not see what was in the bags and opened them, revealing nearly 1.5 pounds of meth.

Ramires argued that the inventory search was illegal. In the Dec. 21, 2004, ruling, the court held that the inventory search of the vehicle was lawful because the officers' agency had a written policy permitting inventory searches.

The search of the bags, however, was illegal because the department had no policy on when containers can be opened during an inventory search.

The state "did not present any evidence of standardized criteria or established routine governing the opening of closed containers found during a search."

Opening containers during an inventory search is lawful, but only if a departmental policy exists that explains when a container can or cannot be searched. The court in *Ramires* states that without a policy, no containers can be searched.

The key to a valid inventory search is having a written departmental policy permitting such searches and setting the standards for making such searches. A department can have a policy that no containers are searched or inventoried or that every container is searched and inventoried.

The court also held that policies need not be "all or nothing." In *Florida v. Wells*, 495 U.S. 1 (1990), the U.S. Supreme Court suggested a written policy that permits officers to inventory any container "whose contents officers determine they are unable to ascertain from examining the exterior."

Officers should inventory items

Inventory searches cannot be used as an excuse for police to rummage through a vehicle. For this reason, any items observed during a search should be inventoried by officers. Containers cannot be searched unless the officer's department has a policy permitting containers to be searched.

Front Line Report is published periodically by the Missouri Attorney General's Office. It is distributed to law enforcement throughout the state. Find issues at ago.mo.gov/lawenforcement.htm
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UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/index.html

U.S. SUPREME COURT

INDEFINITE DETENTION OF ALIENS

Clark v. Martinez

No. 03-878, U.S.S.C., Jan. 12, 2005

Respondents were Cuban nationals who arrived in 1980 in a boatlift. Because of prior criminal convictions in the United States, they were ordered removed but were detained beyond 90 days because removal to Cuba was not reasonably foreseeable. Each filed a habeas corpus petition challenging his continued detention.

A 7-2 Supreme Court held that under immigration statute 8 U.S.C. Section 1231(a)(6), the Homeland Security secretary may detain aliens beyond 90 days but only as long as reasonably necessary to remove them.

The court held that the presumptive period during which a detention is reasonably necessary to effectuate removal is six months, and that an alien must be conditionally released after that time if he can show there is no significant likelihood of removal in the reasonably foreseeable future.

PROBABLE CAUSE

Devenpeck v. Alford

No. 03-710, Dec. 13, 2004

Believing that the respondent was impersonating a police officer, Haner, a Washington State Patrol officer, pulled over the respondent's vehicle. During questioning, Haner's supervisor saw that the respondent was taping their conversation and arrested him for violating the state's privacy act.

The trial court dismissed the charge. The respondent then filed this suit in federal court, claiming his arrest violated the Fourth and 14th amendments.

At trial the jury was instructed that the respondent had to establish lack of probable cause to arrest and that taping police at a stop was not a crime.

An 8-0 Supreme Court held that a warrantless arrest by an officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable cause to believe a crime has been or is being committed. The 9th Circuit's additional limitation — that the offense establishing probable cause must be "closely related" to and based on the same conduct as the offense the arresting officer identifies at the time of arrest — is inconsistent with Supreme Court precedent, which holds that an arresting officer's state of mind (except for facts that he knows) is irrelevant to probable cause.

The court did not decide whether petitioners lacked probable cause to arrest respondent for obstructing or impersonating an officer because the 9th Circuit, having found those offenses irrelevant, did not decide that question.

CONSENT, INEFFECTIVE COUNSEL

Florida v. Nixon

No. 03-931. U.S., Dec. 13, 2004

An 8-0 Supreme Court held that counsel's failure to obtain Joe Nixon's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient. Counsel's effectiveness should be evaluated under the standard prescribed in *Strickland v. Washington*: Did counsel's representation "fall below an objective standard of reasonableness?"

Nixon, arrested for a brutal murder, graphically described to police how he had kidnapped and killed his victim. After gathering overwhelming evidence of guilt, the state indicted Nixon for first-degree murder and related crimes. The assistant public defender filed a not guilty plea and deposed all of the state's potential witnesses.

Satisfied that Nixon's guilt was not subject to reasonable dispute, counsel commenced plea negotiations, but the prosecutors would only recommend a death sentence. Faced with this and a strong prosecution case, counsel concluded he should concede Nixon's guilt, thereby preserving credibility for penalty phase evidence of Nixon's mental instability, and for defense pleas to spare his life.

He several times tried to explain this strategy to Nixon, who remained unresponsive. Nixon gave him little, if any, assistance in case preparation. In trial, Nixon was disruptive and excused himself from most of the proceedings.

In his opening statement, counsel acknowledged Nixon's guilt and urged the jury to focus on the penalty phase. During the state's case, he objected to the introduction of crime scene photos as unduly prejudicial, cross-examined witnesses for clarification, and contested several aspects of jury instructions. In closing arguments, he conceded Nixon's guilt, saying he hoped to persuade the jury during the penalty phase that Nixon should not be sentenced to death.

The jury found Nixon guilty on all counts. At the penalty phase, counsel argued Nixon was not "an intact human being" and had murdered while afflicted with multiple mental disabilities. He called witnesses, relatives and friends who described Nixon's childhood emotional troubles and erratic behavior. He also presented expert testimony about Nixon's low IQ, antisocial personality, emotional instability and psychiatric care, and possible brain damage.

In closing argument, he emphasized Nixon's youth, the psychiatric evidence and the jury's discretion to consider any mitigating circumstances; urged that if not sentenced to death, Nixon would never be released; maintained that the death penalty was inappropriate for a person with Nixon's impairments; and asked the jury to spare Nixon's life.

The jury recommended, and the trial court imposed, the death penalty.

UPDATE: CASE LAW

U.S. SUPREME COURT

THIRD-PARTY STANDING

Kowalski v. Tesmer

No. 03-407, U.S., Dec. 13, 2004

After Michigan's Constitution was amended to require that an appeal by an accused pleading guilty or nolo contendere be by leave of the court, several state judges denied appointed appellate counsel to indigents who had pleaded guilty, and the Michigan Legislature subsequently codified this practice.

Two attorneys filed suit in U.S. District Court, alleging that the practice denies indigents their federal due process and equal protection rights.

The District Court held the practice and statute unconstitutional, but a 6th Circuit panel reversed, holding that in *Younger v. Harris*, 401 U.S. 37, abstention barred the indigents' suit, but that the attorneys had third-party standing to assert the indigents' rights; and that the statute was constitutional. A 6-3 Supreme Court agreed on standing but found the statute unconstitutional.

MISSOURI SUPREME COURT

SUFFICIENCY OF EVIDENCE

State v. Brenda Self

No. 85662, Mo. banc, Feb. 15, 2005

The court reversed the defendant's conviction of failing to cause her child to regularly attend school in violation of Section 167.031, RSMo, because the state failed to offer any evidence that she acted knowingly or purposely in causing her daughter to not regularly attend.

Although no mental state is prescribed in Section 167.031 or 167.061, RSMo 2000, a culpable mental state is required and, under Section 562.021.3, is shown if the state proves the person acted knowingly or purposely.

The necessity of proof of some level of mental state is implicit in the statute's requirement that the parent "cause" the child to attend school regularly, implying an affirmative act by the parent. Accordingly, criminal responsibility exists only when the parent knowingly or purposely fails to cause the child to attend.

The court also found insufficient that the defendant purposely or knowingly failed to cause her child to attend school. The middle school's parent/student handbook suggests that its attendance policy will not apply when the school is satisfied that a student's lack of attendance is due to prolonged illness or extended absence from school, which is in accord with Section 167.031.

The record showed that school officials knew the daughter was pregnant and that they were satisfied she was unable to attend full time. The school excused her absences when she was ill or seeking medical care for her pregnancy.

No evidence was presented that the defendant knew that, despite the excused nature of most absences, these absences could put her in violation of attendance laws or that she caused them.

The court declined to address whether Section 167.031 is unconstitutionally vague or has been interpreted inconsistently. Without a record supporting the parties' allegations that districts inconsistently interpret the statute, it is inappropriate and premature for the court to address the constitutional issue. Also, the defendant provided no evidence that the statute is unconstitutionally vague as applied here.

Rather, the evidence showed she was charged with failing to cause her daughter to attend school on a specific number of days during a specific time.

VICTIM'S REPUTATION FOR VIOLENCE

State v. Ronnie D. Gonzales

No. 86129, Mo. banc, Jan. 25, 2005

The court reversed the defendant's conviction of second-degree murder and armed criminal action, finding the trial court improperly excluded testimony about the victim's reputation for violent, turbulent and bizarre behavior. The trial court misapplied the law in holding that the defendant was required to show his awareness of the victim's reputation for violence before evidence of that reputation could be admitted.

A victim's reputation for violence, turbulence and aggression is admissible when a defendant has asserted self-defense and is relevant when the evidence is offered to prove the victim was the initial aggressor. See *State v. Buckles*, 636 S.W.2d 914, 923 (Mo. banc 1982) (overruled on other grounds), and MAI-CR3d 306.06. Buckles was not overruled by *State v. Johns*, 34 S.W.3d 93, 111 (Mo. banc 2000), which addressed evidence of the victim's reputation to show the reasonableness of the defendant's fear of the victim.

The identity of the initial aggressor exists wholly independent of the defendant's state of mind and, unlike the reasonableness of the defendant's apprehension of danger, the defendant need not have been aware of the victim's reputation for evidence of that reputation to be logically relevant.

CASE TRANSFER

Darius Nicholson v. State

No. 86143, Mo. banc, Dec. 21, 2004

The court reversed the dismissal of Darius Nicholson's Rule 29.15 motion as untimely filed when he filed it in the wrong venue and the court in the proper venue received it after the 90-day filing deadline. Under Section 476.410, RSMo, a circuit court in which a pleading was erroneously filed has limited jurisdiction to transfer the case to a court in which the legislature has deemed venue proper.

Rule 51.10 requires the court to which an action is transferred to treat the action "as if it had originated in the receiving court." This rule does not conflict with Rule 29.15 filing periods because it simply allows review of a motion filed within the Rule 29.15 filing periods but filed in the wrong court. The circuit court is required to treat the motion as if it were filed timely.

UPDATE: CASE LAW

MISSOURI SUPREME COURT

BIFURCATED TRIALS, CONSTITUTIONALITY

State v. Christy L. Jaco

No. 85594, Mo. Banc, Jan. 11, 2005

The court did not err in refusing to declare Section 557.036 unconstitutional and in proceeding with a bifurcated trial. Neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require a jury to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense.

The 20-year sentence was within the unenhanced range of punishment, which was 10 to 30 years or life imprisonment. Because due process does not mandate disclosure of penalty phase evidence or witnesses, the statute does not unconstitutionally fail to require the state to give notice of such evidence or witnesses.

Regardless, the defendant was not prejudiced because several months before trial, the state gave notice of four penalty phase witnesses. The statute does not unconstitutionally permit introduction of character evidence

This court repeatedly has held that either side may introduce evidence of the defendant's character during the penalty phase to help the jury assess punishment, even if that evidence constitutes unadjudicated bad acts. Further, Section 557.036 is a procedural law that may be applied to this case, and it is not inconsistent with any court rules pertaining to the conduct of trials in criminal cases.

The court did not abuse its discretion in refusing to admit photographs that the defendant wanted to submit of her apartment that were taken after a different tenant had moved in.

It is difficult to determine from the photograph where the defendant was standing when she shook the child, and the furniture shown in the photograph was different from what had been in the room when the defendant's son was shaken. Additionally, defense counsel did not question the boyfriend to establish where the defendant had been standing in the room in relation to the new tenant's furniture.

The court properly found that a photograph was not an accurate and fair depiction of the line of sight between defendant and her boyfriend when he saw her shaking the child and properly found that the changes or discrepancies would confuse and mislead the jury.

The court properly refused to admit evidence of scientific studies and statistics concerning the propensities of different types of persons to abuse children. Expert testimony relating to such profile evidence can be admissible to describe behaviors and characteristics commonly seen in child abuse victims.

It is not admissible, however, to show a defendant's responsibility for injury to the victim. Here, the clear inference of the evidence would have been to show that an unrelated male such as the defendant's boyfriend statistically was more likely to have been responsible for the child's injuries than a related female such as the defendant.

EASTERN DISTRICT

MURDER DELIBERATION, CONFESSIONS

State v. Vincent R. Greer

No. 83662, Mo.App., ED., Feb. 1, 2005

In this first-degree murder case, there was sufficient evidence to support deliberation, including Vincent Greer's pursuit of his mother despite numerous roadblocks and his statements that he had previously thought about shooting his parents.

The totality of circumstances showed that Greer's waiver of his rights was knowing and intelligent and that his first confession was voluntary although he was 15 years old. Also, the defendant could have conferred with his uncle, who attended the interrogation.

There also was no error in admitting Greer's second confession at trial although it was given in his counsel's absence. The defendant's Sixth Amendment right to counsel had not yet attached at his second confession.

DOUBLE JEOPARDY

Quentin Yates v. State

No. 84506, Mo.App., E.D., Feb. 15, 2005

The defendant's conviction of two counts of unlawful use of a weapon, one under subsection (3) and one under subsection (9) of Section 571.030.1, RSMo 2000, even if based on the same act, did not violate the double jeopardy clause. The defendant fired multiple shots, one from a vehicle and one into a dwelling house, each constituting a separate and distinct crime.

WESTERN DISTRICT

NON-LESSER INCLUDED OFFENSES

State v. Teddy Collins & Eddie Collins

Nos. 63517 and 63518

Mo.App., W.D., Feb. 8, 2005

The court set aside the defendants' convictions of third-degree assault, Section 565.070, after they were charged, by way of amended information, with first-degree assault, Section 565.050, but were acquitted by the jury of that offense and the lesser-included offense of second-degree assault, Section 565.060.

The trial court erred in instructing the jury on third-degree assault because that offense, as given to jurors, was not charged in the amended information and was not a lesser-included offense of the offense charged, first-degree assault.

The criminal acts hypothesized in the court's third-degree assault instruction were separate and distinct from the criminal acts alleged in the amended information and therefore, the trial court acquired no jurisdiction over non-charged offenses.

UPDATE: CASE LAW

WESTERN DISTRICT

SEARCH & SEIZURE, HOME METH LAB

State v. William Lee Apel

No. 63590, Mo.App., W.D., Feb. 22, 2005

In a prosecution for first-degree drug trafficking and one count of possession of a precursor chemical with the intent to create a controlled substance, the police obtained valid consent to enter the home of William Lee Apel to search for occupants. Once inside, the officers were authorized to seize any evidence in plain view. The incriminating evidence seen, the odor of anhydrous ammonia and the anonymous tip that led police to the home established probable cause to arrest Apel and occupants.

This evidence also established probable cause to obtain a warrant to search any area of the home and curtilage that might reasonably contain evidence of meth production. Since the home had a chemical lab, the warrantless search was reasonable.

DOUBLE JEOPARDY, LESSER-INCLUDED OFFENSES

State v. Ronald S. Dennis

No. 62279, Mo.App., W.D., Feb. 1, 2005

Ronald Dennis' convictions of aggravated forcible rape and first-degree assault were not barred by double jeopardy. Since each offense contained an element not necessary for proof of the other, first-degree assault is not a lesser-included offense of aggravated forcible rape.

The crime of aggravated forcible rape includes the element of sexual intercourse, which is an element not included in the crime of first-degree assault, and first-degree assault requires proof of intent to kill or knowingly cause serious physical injury. The crime of aggravated forcible rape does not contain an intent element, which is an element included in the crime of first-degree assault.

The trial court did not err in denying the defendant's motion to suppress incriminating statements he made to police officers. Evidence showed that his statements were voluntary and not prompted by a promise of leniency or from threats, force or coercion.

PAROLE CONSEQUENCES

Richard Lee Haskett

No. 63516, Mo.App., W.D., Jan. 18, 2005

The state appealed the granting of a Rule 24.035 motion on the finding of ineffective assistance of counsel.

Richard Haskett was not required to understand the parole consequences for his guilty plea to be voluntary. Absent an affirmative misrepresentation to Haskett by his attorney about possible parole, Haskett cannot use a misunderstanding to argue that his plea was involuntary.

However, no credibility determinations were made on what representations were made to Haskett. It cannot be said conclusively that the findings are inconsistent. Since the circuit court made no credibility determinations on what representations were made to the defendant about his parole, the appeals court reversed and remanded with instructions that the circuit court make additional findings and rulings consistent with this opinion.

CONSTRUCTIVE POSSESSION

State v. Anthony Bacon

No. 62384, Mo.App., W.D., Jan. 11, 2005

The court affirmed Anthony Bacon's conviction of felony possession of a controlled substance (marijuana) but reversed his convictions of attempted manufacture of a controlled substance (hashish) and one count of class C felony possession of a controlled substance (cocaine) under the theory of constructive possession.

The charges stemmed from narcotics found by police during a search of Bacon's house, where he lived with one or two women.

Under the totality of circumstances, the evidence supported a finding that Bacon had constructive possession of the marijuana found in a tin in the master bedroom. An officer testified he saw male clothing and hygiene items in the master bathroom and did not see any female items.

Bacon admitted to being the only male occupant and cologne near where the tin was recovered was his. Officers testified the master bedroom and closet were filled with male clothing and items. His wallet and driver's license were found on a dresser. A handgun registered to Bacon was found in the room.

Given the total circumstances, the evidence supported a finding that Bacon had constructive possession over a bag of marijuana found in the attic accessed from the master closet. The closet was filled only with Bacon's items. Given the closeness of the marijuana to Bacon's belongings and the reasonable inference of his exclusive access and control over the master bedroom and closet, the evidence supported a finding that Bacon had constructive possession.

The court reversed Bacon's conviction of cocaine possession. Evidence did not establish he had constructive possession over the pieces of cocaine base found on the kitchen floor. The state failed to present any evidence connecting Bacon to the cocaine aside from his presence, along with another person, in the kitchen.

The evidence did not establish sufficiently that Bacon had knowledge of or control over jars containing marijuana and a liquid being made into hashish, that were found in the garage. Although the jars contained a large amount of marijuana, they were in a closed box out of sight.

No evidence was presented indicating that the defendant had superior access to or control over the garage. No evidence was presented indicating that any items in the garage belonged to him. The record did not establish that Bacon parked his vehicle in the garage.

UPDATE: CASE LAW

WESTERN DISTRICT

STEALING

State v. Ralph F. Bailey
No. 62740, Mo.App., W.D., Jan. 18, 2005

The court upheld Ralph Bailey's conviction of felony stealing for harvesting wheat he planted, cultivated and harvested on his ex-wife's property. By harvesting the wheat, Bailey appropriated the "property of another."

State v. Raymond L. Parsons
Nos. 63112 and 3378
Mo.App., W.D., Jan. 18, 2005

There was sufficient evidence of Raymond Parsons' guilt of stealing under accomplice liability. Evidence showed that Parsons associated himself with others involved in the crime, before and after the crime; jointly possessed (without explanation) the stolen vehicle in close proximity to the time and place of the theft; ran from the stolen vehicle to avoid detection; and tried to deceive police by hiding in a residence where stolen material was found was sufficient.

SOUTHERN DISTRICT

SEXUAL EXPLOITATION OF A MINOR, ENTRAPMENT INSTRUCTION

State v. David R. Bullock
No. 26011, Mo.App., S.D., Jan. 26, 2005

There was sufficient evidence of David Bullock's conviction of attempted statutory rape and attempted sexual exploitation of a minor when police posed as 13-year-old "Ashley" with whom Bullock communicated on the Internet.

Conversations between Bullock and the victim indicated that Bullock would meet "Ashley" and her younger friends at a specific time and location for sex that would be recorded on a camera for viewing by others.

The victim was instructed to get the rest room key at a convenience store and walk toward the rest room.

Bullock arrived on time with a computer, camera and video diskettes. He left the car and looked into the store. As "Ashley" left the store, he turned toward the rest room. This evidence supported a finding that the defendant took a substantial step to commit the crimes.

The court did not err in refusing an entrapment instruction: Bullock's claim that he would not have committed the charged offenses but for the enticement by "Ashley" is not supported by the evidence.

EXPERT TESTIMONY, CHILD ABUSE

State v. Elmer L. Tyra
No. 26173, Mo.App., S.D., Jan. 21, 2005

Expert testimony was admissible in a first-degree statutory sodomy case. The expert's testimony that the victim was generally truthful in treatment sessions with him was not a direct comment on the veracity of the victim's trial testimony or overall credibility as a witness.

His statements were mainly observations of several behavioral indicators in the victim that were consistent with sexual abuse and helped to explain the victim's ongoing behavioral problems. The expert's primary conclusion was that the victim had several behavioral indicators consistent with a sexually abused child.

It is "appropriate for an expert to testify that a child demonstrates age-inappropriate sexual knowledge or awareness, and that a child's behaviors are consistent with a stressful sexual experience."

SEIZURE, CONSENSUAL SEARCH

State v. Faron Fulliam
No. 26155, Mo.App., S.D., Jan. 6, 2005

The trial court properly denied a motion to suppress evidence based on a traffic stop that supported Faron Fulliam's felony conviction of meth possession.

Fulliam was not the subject of an illegal seizure while a trooper performed the search. The initial stop of the vehicle in which the defendant was a passenger was lawful after the trooper observed the vehicle speeding. The driver consented to the vehicle search before the trooper issued a summons.

TRAFFIC STOPS, CREDIBILITY

State v. David Wayne Garriott
No. 63714, Mo.App., W.D., Dec. 21, 2004

The court affirmed David Garriott's conviction for DWI and failing to yield to an emergency vehicle. The circuit court properly denied a motion to suppress, finding the stop was reasonable in that an officer may stop a vehicle for unusual operation, such as a defendant driving off after being hit from behind. The court deferred to the trial court's finding upon conflicting evidence presented by defendant and the officer about when the officer turned on his lights and how long it took before Garriott stopped.

MIRANDA, CUSTODIAL INTERROGATIONS

State v. John Tally
No. 25710, Mo.App., S.D., Jan. 26, 2005

The court reversed John Tally's conviction of production of a controlled substance because the trial court had erred in admitting his statement made while in custody.

Although Tally was told he was not under arrest "at this time" when he admitted marijuana plants were his, he was never told he could end the conversation with police at will, mitigating any inference to be drawn from the fact that police told him he was not under arrest.

There also were inferences that his freedom was restrained. Given the circumstances, it seems unlikely Tally reasonably could have believed anything other than that the setting in which he was questioned was police dominated.

He was always surrounded by three officers, one of whom was either flying a helicopter overhead or landing nearby. Tally's awareness of police procedure would not, given the total circumstances, be so impressive as to compel a finding that Tally was not subjected to un-Mirandized custodial interrogation.

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Using dog during lawful traffic stop not Fourth Amendment violation

Illinois v. Caballes
No. 03-923
U.S. Supreme Court
Jan. 24, 2005

After an Illinois state trooper stopped Roy Caballes for speeding and radioed in, a second trooper, overhearing the transmission, drove to the scene and walked his narcotics-detection dog around Caballes' car while the first trooper wrote a warning ticket.

When the dog alerted at the trunk, the officers searched it, found marijuana and arrested Caballes.

At trial, the court denied his motion to suppress the seized evidence, holding that the dog's alerting provided sufficient probable cause to conduct the search.

Caballes was convicted, but the Illinois Supreme Court reversed, finding that because there were no specific and articulable facts to suggest drug activity, use of the dog unjustifiably enlarged a routine traffic stop into a drug investigation.

A 6-2 U.S. Supreme Court held that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that someone has no right to possess does not violate the Fourth Amendment.

Killer guilty of first-degree murder, had time to deliberate

State v. Robert D. Hudson
No. 26052
Mo.App., S.D., Jan. 6, 2005

There was sufficient evidence of deliberation to convict Robert Hudson of first-degree murder. He had the chance to stop the prolonged struggle. After cleaning up in a bathroom, Hudson returned to the living room where the victim lay wounded. He then stabbed him two more times and tried to break his neck.

This evidence disclosed beyond a reasonable doubt that Hudson had time to think about his actions before completing the attack that resulted in death.

Deliberation for purposes of proving first-degree murder occurs if a person had time to think and intended to kill the victim for any period of time. The shortness of time for deliberating and premeditating killing is immaterial for purposes of proving first-degree murder.